TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the petitioner, Vanessa Leggett, through the undersigned counsel, and pursuant to Rule 12, files this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

On August 17, 2001, the Court of Appeals for the Fifth Circuit affirmed, in an unpublished opinion, the District Court's order of July 20, 2001 that held Ms. Leggett in civil contempt. A petition for rehearing *en banc* was denied on November 13, 2001. All of the opinions are appended to this petition.

BASIS FOR JURISDICTION

1. The final opinion of the Court of Appeals for the Fifth Circuit was delivered on November 13, 2001. The three judge panel opinion for the Fifth Circuit was filed on August 17, 2001.

2. Petitioner asks this Court to review the final judgment of the Court of Appeals with respect to questions of law arising under the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

4. This petition is timely if filed on or before February 11, 2002.

CONSTITUTIONAL PROVISIONS RELIED UPON

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On July 19, 2001 petitioner Vanessa Leggett, a free-lance journalist, was held in civil contempt under 28 U.S.C. § 1826 by a judge of the United States District Court for the Southern District of Texas after Ms. Leggett refused to reveal her confidential source information in response to a grand jury subpoena (Tran. II-46).[1] Ms. Leggett is a reporter and author[2] who has conducted four years of tape-recorded interviews in six states as part of her research for a book on the "Robert Angleton murder case" in Houston, Texas. Mr. Angleton was tried and acquitted of capital murder in a Texas state court in August, 1998. After his acquittal, the U.S. Attorney's office for the Southern District of Texas instituted an investigation of him for federal charges.

The federal prosecutors began their efforts to seek information from Ms. Leggett in July, 2000 (Tran. I-23). Knowing she was writing a book, FBI agents, in November, 2000, tried to recruit Ms. Leggett as a secret investigator by offering her a confidential informant contract,

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[1] The record is designated herein as follows: "Rec. Exc." is the Record Excerpts volume, prepared for the Court of Appeals, containing germane court documents. "Tran. I" and "Tran II" refer to transcripts from district court hearings on July 6, 2001 and July 19, 2001 respectively.

[2] Ms. Leggett has previously received media credentials from *Texas Monthly* and the *Houston Press*. She has also been published in the FBI's book *The Varieties of Homicide and its Research,* in the short story anthology *Suddenly* and by *Newsweek*. Ms. Leggett has also won first place for her writings from the Fort Bend Writers Guild and the Santa Barbara Writers Conference.

which included oral promises of financial gain, but also required her to notify the FBI before disseminating or publishing her book or any of her materials. She declined their proposal. She believed that working for the government as a secret informant would impair her ability to research and write as an independent investigative reporter, and she did not want the government restricting the dissemination of her book (Tran. I-26-27). Immediately upon receiving her refusal, the FBI agents served Ms. Leggett with a grand jury subpoena, requiring her appearance a month later. Ms. Leggett complied with that subpoena, relying on the FBI's promise that she would not be asked to reveal her confidential source information (Tran. I-24-25).[3] That promise was honored on December 7, 2000, when she testified (Tran. I-24).

In June, 2001, the government served Ms. Leggett with a new grand jury subpoena that compelled production and surrender of the following items:

> "**Any and all** tape recorded conversations, **originals and copies**, of conversations you had with the following individuals, [34 people listed] or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, **and all transcripts** prepared from those tape recordings:" [Emphasis added.]

Ms. Leggett filed a motion to quash the subpoena. On July 6, 2001, the District Court denied the motion. The

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[3] Ms. Leggett testified during the Motion to Quash that a number of her sources demanded confidentiality (in some instances in writing) because they were afraid of retaliation by Angleton.

judge ruled that there is *no* qualified privilege for journalists to protect either confidential or nonconfidential sources in criminal cases in the Fifth Circuit, citing *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), as well as this Court's seminal decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Ms. Leggett filed a *pro se* Motion to Reconsider on July 16, 2001. In that motion, Ms. Leggett pointed out that a demand for her to turn over all originals and copies of recordings, as well as transcripts of those recordings, would deprive her of the resources she needed to continue her journalistic work. The government never filed a response to this motion.

An identical subpoena was again served on Ms. Leggett on July 18, 2001, directing her to appear before the grand jury the next morning. On the present record, it is not clear why the prosecutors did not show a compliance with their own internal Department of Justice procedures which is required to precede issuance of a subpoena to a journalist.[4] Ms. Leggett appeared as directed, but she invoked the journalist's qualified privilege under U.S. CONST. amend. I and the privilege against self-incrimination under U.S. CONST. amend. V. In recognition of Ms. Leggett's Fifth Amendment claim of privilege, the Assistant U.S. Attorney produced an "informal letter" for use immunity[5] (Tran. II-3).

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[4] Under 28 C.F.R. § 50.10, the Justice Department is to conduct an in-house review, balancing its investigative needs with the journalist's interests, and then obtain the approval of the U.S. Attorney General before obtaining the subpoena.

[5] Ms. Leggett had testified during the Motion to Quash hearing that she had tape recorded some interviewees without their knowledge. (Tran. I-28 and 34). The prosecution later

The district judge ordered Ms. Leggett to comply with a particular line of questioning about recordings. When Ms. Leggett continued to invoke her constitutional privileges, the district court held Ms. Leggett in contempt (Tran. II-50-54). In the course of the hearing, the judge did not receive evidence or articulate findings with respect to any balancing of the interests involved in the First Amendment question. The district court also did not enter findings as to whether the informal offer of partial use immunity was sufficient to protect the Fifth Amendment privilege.[6] The district court went on to deny Ms. Leggett's previously filed *pro se* Motion to Reconsider without argument (Tran. II-10). The court ordered Ms. Leggett to be incarcerated the next day (Tran. II-54, 63). At the time of this filing, Ms. Leggett has been held in custody for over 160 days, which is more than three times as long as any other reporter in United States history.[7]

An expedited appeal was ordered, but Ms. Leggett's motions for stay or bond pending appeal were denied both by the District Court and the Court of Appeals. On

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acknowledged in the contempt hearing that there are at least "5-6 states" in which non-consensual recordings might result in criminal charges. (Tran. II-35). Similarly, the mere possession of surreptitious interception devices may be a violation of federal law under 18 U.S.C. § 2512.

[6] The prosecutor acknowledged that his informal immunity letter was not the same as statutory immunity pursuant to 18 U.S.C. §§ 6001, *et seq.*, but mistakenly thought the difference was that the letter did not offer transactional immunity.

[7] The Reporter's Committee for a Free Press has compiled a list of known contempt sanctions against American journalists and publishes them on their web site: www.rcfp.org.

August 17th, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's order. *See* Appendix. Ms. Leggett timely sought *en banc* reconsideration, which was denied on November 13, 2001.

REASONS FOR REVIEW

I.

Did the Court of Appeals err in holding that the petitioner was not protected by the qualified First Amendment privilege for journalists?

For almost thirty years, lower courts have struggled to interpret and apply the First Amendment qualified privilege articulated by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The result has been an unequal implementation of the privilege across the United States with news gatherers receiving disparate treatment depending on which Court of Appeals they appear before. The issue has become one of national importance and the time is ripe for this Court to provide clarification.

In *Branzburg*, this Court recognized that journalists enjoy some degree of constitutional privilege against disclosure of confidential source information. 408 U.S. at 709. Although this Court found in *Branzburg* that the governmental interest in a grand jury's investigative function outweighed the privilege on the facts of those cases,[8] this Court's recognition of the underlying privilege has remained the case's most important aspect. An

[8] *Branzburg* involved three consolidated cases.

amicus brief submitted by interested journalistic organizations to the Court of Appeals collated almost three dozen state and federal cases recognizing some degree of privilege in the wake of *Branzburg*.[9] Yet as the *amici* journalistic organizations observed in their brief, "it cannot be said that a consensus has been reached."

A widely accepted interpretation of *Branzburg*, based in part on Justice Powell's concurring opinion, is that the qualified privilege for news gatherers under the First Amendment means there is a balancing test that should be conducted on a case-by-case basis. Justice Powell's concurring opinion in *Branzburg* stated:

> The asserted claim of privilege [by a journalist] should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant

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[9] The *amicus* brief was filed by The Reporter's Committee for Freedom of the Press, The American Society of Newspaper Editors, The Radio-Television News Directors Association, and The Society of Professional Journalists. The following organizations also moved to join the *amicus* brief but their motion, which was untimely, was denied: ABC, Inc., The American Society of Journalists and Authors, The Associated Press, Belo Corp., Cable News Network LP, California First Amendment Coalition, CBS News, The Copley Press, Dow Jones & Company, Inc., The Freedom of Information Foundation of Texas, Investigative Reporters and Editors, Inc.. Louisiana Press Association, Mississippi Center for Freedom of Information, Mississippi Press Association, National Broadcasting Company, Inc., National Writers Union, The New York Times Company, Student Press Law Center, Texas Association of Broadcasters, Texas Daily Newspaper Association, Washington Independent Writers, Washington Independent Writers Legal and Education Fund and The Washington Post Company.

> testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

408 U.S. at 710 (Powell, J., concurring).

The Fifth Circuit has impeded application of such a case-by-case balancing test, as is illustrated by the decision in *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998) and now by the decision in the present case, by finding that there is no qualified privilege afforded to journalists in criminal cases. Relying primarily on *Smith*, the Court of Appeals held in this cause that the journalist's privilege is "ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." Slip opin., p. 6. The Court affirmed the lower court's failure to conduct any balancing of the interests and its application of a more narrow "intentional harassment" standard to Ms. Leggett's claim of privilege. The Fifth Circuit's interpretation of *Branzburg* diminishes the importance of the qualified First Amendment privilege to no more than a weakened version of a procedural rule (i.e., Fed. R. Crim. P. 17(c)[10]) and ignores *Branzburg's* edict that newspersons enjoy an actual form of constitutional privilege. This Court should grant a writ in this case in order to clarify these issues.

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[10] Fed. R. Crim. P. 17(c) states in relevant part: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

A.

Do journalists have a qualified First Amendment privilege in criminal cases that require a court to conduct a balancing of interests on a case-by-case basis?

In the shadow of *Branzburg*, federal circuit courts have generally recognized a "qualified privilege" for journalists to resist disclosure of sources' identities and source materials. Courts have repeatedly acknowledged the chilling effect and resulting self-censorship that discovery of a journalist's unpublished information can have on the gathering and reporting of news. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Society's interest in protecting the integrity of the news gathering process, and in insuring the free flow of information to the public is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.' " (internal cites ommitted)). What the courts are ultimately protecting, when acknowledging a journalist's qualified privilege, is the public's "right to know".

The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and D.C. Circuits have all interpreted *Branzburg* as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.[11] Moreover, eight federal circuits have held that the

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[11] *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Bruno & Sullivan, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1982), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broadcasting Co.*, 780 F.2d

qualified privilege applies to journalists faced with a subpoena seeking discovery of confidential sources or, where the subpoenaing party has not met its burden, for unpublished information.[12]

This Court has stated that news gathering activities are entitled to protection under the First Amendment because without it, "[the] freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. Justice Powell's concurrence in *Branzburg* arguably provides the lower courts with the means of protecting that concern – by conducting a balancing of the countervailing interests on a case-by-case basis. What remains in question amongst the circuits is to what degree should the balancing of interests occur based on the "type" of case before the court.

For example, in the Fifth Circuit, the Court acknowledges an expansive balancing of interests test when faced with a journalist's qualified First Amendment privilege in certain civil cases. In those cases, it uses a three prong test to weigh whether discovery of the requested information is appropriate by assessing if:

1134 (4th Cir. 1986); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

[12] *See Clyburn v. New World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *United States v. LaRouche Campaign, supra; LaRouche v. National Broadcasting Co., supra; United States v. Burke, supra; United States v. Cuthbertson, supra; Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (1980); *Shoen v. Shoen, supra; Silkwood v. Kerr-McGee Corp, supra.*

1) the information is relevant;

2) the information can be obtained by alternative means; and

3) if there is a compelling interest in the information.

Miller v. Transamerican Press, Inc., supra at 726. Nevertheless, the Fifth Circuit refuses to broaden its application of its three part balancing test to criminal cases, while other circuits do not. As will be demonstrated in more detail below, there is a great division amongst the circuits as to how the news gatherer's qualified First Amendment privilege is applied in criminal cases; thus, favoring the grant of certiorari. Sup. Ct. R. 10.

B.

Has the Court of Appeals in the Fifth Circuit entered a decision regarding application of a journalist's qualified First Amendment Privilege that is in conflict with the decisions of other United States Court of Appeals on the same matter?[13]

The circuits are in dispute whether the First Amendment necessitates a qualified privilege in criminal cases.

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[13] Although this case deals with a subpoena in a grand jury setting, it is very likely that Ms. Leggett will be resubpoenaed for the same information in the actual criminal trial. The Fifth Circuit's test applying only harassment or oppression remains the same in both instances and its conflict with other circuits does not change. If the grand jury ends with Ms. Leggett remaining steadfast in her assertion of her privileges, this court is nonetheless urged to accept this writ, in order to prevent these issues, which are very capable of repetition, from escaping review in this case.

A circuit-by-circuit analysis is provided below to exemplify the apparent conflict.

DISTRICT OF COLUMBIA CIRCUIT

The Court of Appeals has held, citing *Branzburg*, that a "good faith" criminal investigation overrides a journalist's interest in protecting sources in all criminal settings including a grand jury, although the court suggests a different standard might apply to a "bad faith" investigation. *Reporter's Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). – *But see United States v. Hubbard*, 493 F.Supp. 202 (D.D.C. 1979) (Reporters protected under First Amendment and *Branzburg* from a subpoena in a criminal case, unless showing made that information is necessary for a fair hearing and not available from other sources); *In re Grand Jury 95-1*, 27 Med. L.Rptr. 1833 (D.D.C. Dec. 27, 1996) (Media has no First Amendment privilege under *Branzburg* to withhold documents sought by grand jury, and even if privilege were to apply, it has been overcome by a showing that materials are relevant, alternative sources had been exhausted and compliance with 18 C.F.R. § 50.10 – the Department of Justice's internal regulations regarding subpoenaing news gatherers).

FIRST CIRCUIT

The Court of Appeals has held that when a newsman asserts a qualified First Amendment privilege in response to a defendant's subpoena for non-confidential materials

in a criminal case, the lower court must conduct a balancing of the applicable constitutional interests. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988). The lower court shall weigh a defendant's right to a fair trial – that is, a right to compulsory process and confrontation of adverse witnesses – against the First Amendment concerns of the news media as part of its *in camera* inspection of the subpoenaed materials. *Id.* The lower court is expected to limit the disclosure of journalistic products to those cases where their use would be of significant utility to a criminal defendant. *Id.* at 1183.

SECOND CIRCUIT

The Court of Appeals has held that the standard of review for a journalist's qualified First Amendment privilege should remain the same in both civil and criminal cases. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). The Court applied a three part test in *Burke*, a criminal case, in order to balance the competing constitutional interests on a case-by-case basis. *Id.* The Court ordered that a journalist's subpoenaed materials could be disclosed only where there has been a clear and specific showing that the material sought is: 1) highly material and relevant; 2) necessary or critical to the maintenance of the claim by the party; and 3) not obtainable from other available sources. *Id.* Such a balancing of interests under the First Amendment should even occur where a reporter is asked to testify before a grand jury. *Baker v. F & F Investment*, 470 F.2d 778, 784-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (citing *Branzburg*). Yet, when a reporter is an actual witness to the crime itself, such as was the case in *Branzburg*, First